FILED
JUN 13 1996
CLERK

(3)

No. 95-1567

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

STATE OF INDIANA,
Petitioner,
v.
ROSS BRYANT,
Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Indiana

---

REPLY TO BRIEF IN OPPOSITION

PAMELA CARTER
Attorney General of Indiana

GEOFFREY SLAUGHTER*
DAVID ARTHUR
GEOFF DAVIS
Deputy Attorneys General

Office of Attorney General
219 State House
Indianapolis, Indiana 46204
(317) 232-6255

*Counsel of Record

6 pp

No. 95-1567

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

STATE OF INDIANA,
Petitioner,
v.
ROSS BRYANT,
Respondent.

REPLY TO BRIEF IN OPPOSITION

The plain text of the decision below shows that Respondent is wrong to claim it was based on the Indiana Constitution. (Opp. Cert. 2, 5-7.) The Indiana Supreme Court based its holding exclusively on the Double Jeopardy Clause of the federal Constitution and expressly rejected a state law claim: "[Respondent] has presented no cogent argument with respect to his Indiana claim. He thus presents no viable state constitutional basis for his appeal." (Cert. Pet. A-5 n.12) (citation omitted).

By his silence, Respondent implicitly concedes that no other state or federal court has extended the reach of the Double Jeopardy Clause as far as the Indiana Supreme Court's holding that jeopardy attaches upon the mere administrative assessment of the state's drug excise tax. The decision below thus adds to the confusion among lower courts about the way double jeopardy principles apply to taxes and civil sanctions that are imposed in connection with

illegal drugs.[1] The conflict on this compelling double jeopardy question warrants this Court's certiorari review. SUP. CT. R. 10(b).

Petitioner apologizes for its obvious misstatement that "Respondent pursued none of [his] administrative remedies." (Cert. Pet. 3). In fact, Respondent administratively challenged the amount of the assessed tax, arguing both that he never possessed the seized marijuana, and that the weight measurement was error. The state department of revenue rejected his possession claim but

---

[1] For conflicting state cases, see *Desimone v. State*, 904 P.2d 1 (Nev. 1995) (jeopardy attaches when assessed tax liability has been reduced to judicial judgment), *petition for cert. filed*, 64 U.S.L.W. 3469 (Jan. 2, 1996) (No. 95-1058); and *State v. Litchfield*, 902 P.2d 921 (Colo. App. 1995) (jeopardy attaches when there has been final administrative determination of tax liability), *aff'd on other grounds*, ___ P.2d ___ (Colo. Jun. 3, 1996) (No. 95SC331).

For conflicting federal cases, see *United States v. Idowu*, 74 F.3d 387, 396 (2d Cir. 1996) (suggesting jeopardy attaches no earlier than when trier of fact begins to hear evidence at judicial forfeiture proceeding or when there is order for final administrative action against defendant's property), *cert. denied*, 116 S. Ct. ___ (U.S. Jun. 3, 1996) (No. 95-8843); *United States v. McDermott*, 64 F.3d 1448, 1455 (10th Cir. 1995) ("Nor do we consider the mere filing of an administrative claim sufficient to trigger jeopardy, at least where that act converts the proceeding to a judicial one with an opportunity for hearing."), *cert. denied*, 116 S. Ct. 930 (1996); *United States v. Baird*, 63 F.3d 1213, 1218 (3rd Cir. 1995) (jeopardy attaches when defendant is "put to trial before a trier of facts"), *cert. denied*, 116 S. Ct. 909 (1996); *United States v. Ursery*, 59 F.3d 568, 572 (6th Cir. 1995) ("Jeopardy attaches in a nontrial forfeiture proceeding when the court . . . enters the judgment of forfeiture"), *cert. granted*, 116 S. Ct. 762 (1996); *United States v. Barton*, 46 F.3d 51, 52 (9th Cir. 1995) (suggesting jeopardy might attach as soon as defendant "file[s] his answer to the forfeiture complaint"); *United States v. Torres*, 28 F.3d 1463, 1465 (7th Cir.) (jeopardy attaches "when the case is first presented to the trier of fact"), *cert. denied*, 115 S.Ct. 669 (1994); and *United States v. Park*, 947 F.2d 130, 135 (5th Cir. 1991) (no jeopardy until adjudication or final administrative action), *vacated in part on other grounds on rehearing in part*, 951 F.2d 634 (5th Cir. 1992).

agreed that his tax liability should have been based on 358.5 grams of marijuana, not 2092 grams. The revenue agent had improperly included the weight of the marijuana plants' "stalks and stems" instead of just the "leafy substance." (Opp. Cert. 4a.) Respondent's case is now before the Indiana Tax Court, which stayed further proceedings pending this Court's disposition of the petition for certiorari. (Opp. Cert. 8a.)

The fact that an administrative case is pending does not affect the "cert-worthiness" of this petition. Regardless of the outcome of the administrative proceeding, Respondent's subsequent criminal prosecution is barred as a second jeopardy, under the reasoning of the decision below, because the assessment itself was determined to be a first jeopardy on the purported authority of this Court's double jeopardy jurisprudence.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

PAMELA CARTER
Attorney General of Indiana

GEOFFREY SLAUGHTER*
DAVID ARTHUR
GEOFF DAVIS
Deputy Attorneys General

*Counsel of Record

Dated: June 1996